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UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 ERIC SCHMIDT,

16 Defendant.

No. CR 22-00174-SB

GOVERNMENT'S MOTION TO STRIKE
AND SENTENCING POSITION

Hearing Date: 2/28/23
Hearing Time: 8:00 a.m.
Location: Courtroom of the Hon.
Stanley Blumenfeld, Jr

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18 Plaintiff United States of America, by and through its counsel of record, the
19 United States Attorney for the Central District of California and Assistant United States
20 Attorney Brittney M. Harris, hereby files its motion to strike and sentencing position for
21 defendant Eric Schmidt.

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1 This motion and sentencing position is based upon the attached memorandum of
2 points and authorities, the files and records in this case, and such further evidence and
3 argument as the Court may permit.

4 Dated: February 13, 2023

Respectfully submitted,

5 E. MARTIN ESTRADA
United States Attorney

6 MACK E. JENKINS
7 Assistant United States Attorney
Chief, Criminal Division

8
9 /s/ Brittney M. Harris
10 BRITTNEY M. HARRIS
Assistant United States Attorney

11 Attorneys for Plaintiff
12 UNITED STATES OF AMERICA
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant packaged and mailed a one-kilogram vacuum-sealed brick of compressed powdered fentanyl through the United States postal system with the intent that it be distributed to customers in New York. For his conduct, defendant was charged by indictment with one count of possession with intent to distribute fentanyl, with a ten-year mandatory-minimum penalty enhancement, as set forth in 21 U.S.C. § 841(b)(1)(A)(vi), because the amount of fentanyl involved was over 400 grams. Defendant proceeded to trial in November 2022 and was convicted.

In December 2022, the United States Attorney General issued two memoranda setting forth prosecution policies for certain cases, including drug cases involving mandatory-minimum penalties. Together, the memoranda advise prosecutors to evaluate in pending cases whether mandatory-minimum penalties are appropriate considering four factors enumerated in the policies. As required by the memoranda, the government has evaluated the instant case and has determined that defendant's conduct meets the enumerated factors, and therefore, hereby moves to strike the mandatory-minimum penalty provision in the indictment, pursuant to Federal Rule of Criminal Procedure 48(a). The government requests that the Court grant the government's motion and proceed to sentencing defendant under 21 U.S.C. § 841(a)(1), (b)(1)(C), which is the non-mandatory minimum penalty provision for Schedule I and II substances. Defendant concurs with the government's motion and request.

With respect to the Guidelines calculation, the government agrees with the USPO's determination that the base offense level is 30, which corresponds to the drug quantity range that includes the 1,008 kilograms of fentanyl that defendant possessed. The government further concurs with USPO that defendant is not eligible for safety valve relief because he has not fulfilled the criterion requiring him to provide all truthful information that he has on his crimes to the government, and that he is not eligible for an

1 acceptance of responsibility reduction because he proceeded to trial. However, the
2 government believes that defendant's conduct warrants a two-level minor role reduction
3 under U.S.S.G. § 3B1.2(b) because defendant's role in the crime was limited, he did not
4 exercise decision-making authority within the organization, and his benefits were
5 minimal. With that reduction, the government believes that the appropriate Guidelines
6 range is 87-108 months' imprisonment. The government recommends a sentence of 87
7 months' imprisonment, followed by a three-year term of supervised release, and a \$100
8 special assessment.

9 **II. STATEMENT OF FACTS**

10 On or about August 24, 2021, defendant shipped a fentanyl-filled parcel at the
11 United States Post Office in Apple Valley, intending for it to be delivered to someone in
12 New York. The parcel was intricately and purposefully wrapped in multiple layers, all
13 of which were intended to hide the drugs inside and evade law enforcement detection.
14 Specifically, inside of the parcel was a medium USPS Priority Mail box with an address
15 label bearing the same recipient address as the outside of the parcel and was closed with
16 tape that contained seven fingerprints belonging to defendant. Inside of the medium box
17 was a blue and white bubble mailer, which was closed with clear tape that contained
18 three fingerprints belonging to defendant, and again was addressed to the same recipient.
19 Inside of the bubble mailer was a foil wrapped brick-shaped item, and an old metal tool
20 used to thwart x-ray detection and law enforcement's investigation into the parcel.
21 Inside of the foiled item was a vacuum-sealed bag that contained five of defendant's
22 fingerprints. Inside of the bag was a brick that was wrapped with several layers of
23 packaging, including plastic wrap, dryer sheets, and coffee grounds, all of which were
24 intended to thwart canine detection of the drugs contained inside. Beneath all of the
25 packaging was 1,008.2 grams of compressed powdered fentanyl, which the
26 government's expert testified was enough for approximately 200,000 doses of fentanyl.
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1 On June 20, 2022, agents executed search warrants at defendant's residence and
2 found two boxes of plastic vacuum bags in the garage. The same day, agents also
3 conducted a Mirandized interview of defendant. Defendant admitted that he packaged
4 the parcel in his garage and shipped it from the Apple Valley Post Office. Defendant
5 further admitted that at the time he mailed it, he believed it was methamphetamine, and
6 later found out from the person who supplied it that it was, in fact, fentanyl. Defendant
7 also admitted that he owned a heat sealing device.

8 At trial, defendant testified that he mailed the parcel and that he handwrote the
9 recipient address on the three layers (the outer box, inner medium box, and blue bubble
10 mailer).¹ Defendant further testified that he was paid \$100 to mail the drug parcel.
11 Contrary to defendant's admission to law enforcement in June 2022, however, defendant
12 testified at trial that he did not know the parcel contained drugs at all and that he never
13 told law enforcement that he believed it contained methamphetamine.

14 **III. GOVERNMENT'S MOTION UNDER RULE 48(a)**

15 Pursuant to new Department of Justice ("DOJ") policies and Federal Rule of
16 Criminal Procedure 48(a), the government seeks leave of Court to dismiss the increased
17 penalty provision against defendant, pursuant to 21 U.S.C. § 841(b)(1)(A), as set forth in
18 the indictment.

19 On December 16, 2022, the United States Attorney General issued two
20 memoranda setting forth new DOJ charging and prosecution policies.² The first, entitled
21 General Department Policies Regarding Charging, Pleas, and Sentencing (the "General
22 Policies Memorandum"), sets forth new charging policies with respect to mandatory-
23 minimum offenses and further directs prosecutors to a more specific policy on drug
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25 ¹ The government's expert testified at trial that drug traffickers often include the
26 recipient information on the inner layers in case the parcel is inadvertently opened during
the transportation process.

27 ² The General Policies Memorandum can be found at
28 <https://www.justice.gov/media/1265326/dl?inline>. The Drug Cases Policy
Memorandum can be found at <https://www.justice.gov/media/1265321/dl?inline>.

1 cases, which was issued the same day. The second memorandum, entitled Additional
2 Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases, sets
3 forth new DOJ policies for drug cases, which includes four factors that prosecutors must
4 consider before proceeding with mandatory-minimum penalties against a defendant. The
5 General Policies Memorandum advises prosecutors, in cases wherein final judgement
6 has not yet been imposed, to “take steps to render the charging document, plea
7 agreement, and the sentence consistent with these policies – to the extent possible and as
8 the prosecutors in their discretion deem appropriate in light of the federal interests
9 involved.”

10 Based on the DOJ’s new policies, the government reviewed the instant
11 prosecution and has determined that defendant does not meet the DOJ’s new criteria for
12 proceeding with a mandatory-minimum penalty against defendant and because final
13 judgment has not yet been imposed, the government must “take steps” to remove such
14 penalties against defendant.

15 The government believes that this remedy can be accomplished through a motion
16 pursuant to Federal Rule of Criminal Procedure 48(a). Rule 48(a) allows the
17 government to move the Court to dismiss an indictment, information, or complaint, and
18 if made during or after trial, the government must do so with the defendant’s consent.
19 The Ninth Circuit, like most if not all circuits, recognizes that the traditional role of
20 prosecutorial decisions rests with the executive branch and that district courts should
21 grant Rule 48 motions by the government so long as they are made in good faith. See,
22 e.g., United States v. Hayden, 860 F.2d 1483, 1487 (9th Cir. 1988) (“While the judiciary
23 has been authorized to supervise prosecutorial decisions to dismiss, Rule 48(a) was not
24 enacted for the purpose of usurping the traditional role of the prosecutor to determine
25 whether to terminate a pending prosecution” and in assessing propriety of a prosecutor’s
26 Rule 48 motion, the court should consider whether the motion is made in good faith); see
27 also United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975) (“The Executive remains

1 the absolute judge of whether a prosecution should be initiated and the first and
2 presumptively the best judge of whether a pending prosecution should be terminated.”)
3 The Supreme Court has recognized Rule 48 motions by the government even when they
4 are made pursuant to DOJ policies and even when such motions are made after trial. See
5 generally, Rinaldi v. United States, 434 U.S. 22, 30-31 (1977) (finding that the
6 government’s Rule 48 motion, which was made pursuant to the DOJ’s Petit policy, was
7 in the public’s interest and should have been granted despite the motion being made
8 post-conviction).

9 In the instant case, the government seeks leave of Court to dismiss the mandatory-
10 minimum penalty provision, pursuant to 21 U.S.C. § 841(b)(1)(A), as set forth in the
11 indictment against defendant, in light of the DOJ’s new charging policies, which were
12 pronounced after defendant’s conviction, but before sentencing. While Rule 48(a) does
13 not expressly permit the government to strike only part of a count; the government
14 believes that because Rule 48 permits the government to move the Court to dismiss an
15 entire count, it follows that Rule 48 could encompass dismissal of an increased penalty
16 provision contained within a count, and case law generally recognizes that prosecutorial
17 decisions rest with the executive branch. The government’s motion is sought in good
18 faith because it is made pursuant to new DOJ policies that were pronounced after
19 defendant’s conviction. Further, the motion is in the public’s interest because the
20 Attorney General’s purpose for the new policies, in part and as explained in the
21 memoranda, is out of a recognition that mandatory minimum sentences have resulted in
22 disproportionately severe sentences for certain defendants. Finally, the motion is in
23 defendant’s interest because it would remove the ten-year mandatory-minimum penalty
24 that would otherwise apply to his case. Defendant concurs with the government’s Rule
25 48(a) motion seeking to strike the penalty provision in the indictment and the parties
26 request that the Court grant the government’s motion and proceed to sentencing pursuant
27 to the non-mandatory minimum custodial penalties set forth in 21 U.S.C. § 841(b)(1)(C).

IV. GUIDELINES CALCULATION AND STATUTORY PENALTIES

The USPO determined, and the government agrees that defendant's base offense level is 30, pursuant to U.S.S.G. § 2D1.1(a)(5), (c)(5), which reflects fentanyl quantities between 400 grams and 1.2 kilograms. The USPO further determined, and the government agrees, that defendant is not eligible for safety valve relief because he has not fulfilled the criterion requiring him to provide all truthful information that he has on his crimes to the government, and that he is not eligible for an acceptance of responsibility reduction because he proceeded to trial. The USPO concluded that with a criminal history category of II, defendant's guidelines range is 120-135 months' imprisonment. As an aside, the actual Guidelines range for an offense level of 30 and criminal history category of II is 108-135 months' imprisonment. However, the government believes that the USPO increased the low-end of the range (from 108 to 120 months) to reflect the ten-year mandatory-minimum penalty charged in the indictment.

The government does not agree with the USPO's final calculation for two reasons. First, as explained above, the government is moving the Court to strike the increased penalty provision charged in the indictment. Thus, if granted, there would not be an mandatory-minimum custodial penalty under 21 U.S.C. § 841(a)(1), (b)(1)(C), and therefore, the Guidelines range would not need to be modified to account for any statutory mandatory minimum term of imprisonment. Second, the government believes that a two-level reduction for minor role is appropriate in this case because defendant's conduct meets all of the factors set forth in U.S.S.G. § 3B1.2(b). Specifically, defendant's involvement in the drug trafficking organization was limited to packaging and shipping one kilogram of powdered fentanyl. While the elaborate nature of defendant's packaging, the inclusion of a metal tool in the parcel, and the layered recipient address information strongly suggests that defendant has packaged drug parcels before (because such features would not be known by a lay person who had no prior involvement in trafficking drugs through the mail), defendant's conduct is not so vast

1 that it can be said that he had a supervisory role or exercised decision making authority
2 in the drug trafficking organization. Even if defendant had packaged drug parcels before
3 (which the government strongly believes is the case based on the packaging, and that he
4 owned a heat sealing device and had two boxes of vacuum sealed bags in his garage),
5 defendant's role in the organization was likely limited to packing and shipping drug
6 parcels and that he was likely not privy to the inner workings or had knowledge of the
7 structure of the drug trafficking organization, beyond information about the person(s)
8 who gave him the drugs for shipment. Defendant's benefits were monetary
9 compensation, which, according to him, was \$100 for mailing the parcel. With a two-
10 level minor role reduction, the government believes defendant's offense level is 28, with
11 corresponds to a Guidelines range of 87-108 months' imprisonment.

12 Finally, pursuant to 21 U.S.C. § 841(b)(1)(C), there are no statutory mandatory
13 minimum terms of imprisonment; however, there is a mandatory minimum term of three
14 years of supervised release.

15 **V. ARGUMENT**

16 The government believes that a low-end Guidelines sentence of 87 months'
17 imprisonment followed by a three-year period of supervised release, and a \$100 special
18 assessment is a sufficient, but not greater than necessary sentence in this case.

19 Considering the nature and circumstances of the offense, there is no question that
20 defendant's criminal conduct in sending approximately 200,000 doses of deadly fentanyl
21 through the mail system is very serious. Moreover, defendant's conduct strongly
22 suggests that he has mailed drug parcels in the past. The elaborate nature in which he
23 packaged the parcel included multiple features in order to thwart law enforcement
24 detection of the drugs contained inside and included some features that would not be
25 known by a novice who had never packaged drug parcels before (such as including a
26 metal tool to thwart x-ray detection). Overall, defendant's conduct is serious and his
27 sentence should account for that. Defendant's limited role in the overall drug trafficking
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1 organization is factored in through the two-level minor role reduction and in the
2 government's low-end recommendation. Thus, given the serious nature of the offense
3 and that the government's recommendation already accounts for defendant's limited
4 involvement, 87 months is appropriate.

5 Defendant's history and characteristics are not particularly mitigating. Defendant
6 has a long criminal history of drug related offenses from 1996 onwards. Defendant also
7 has completed high school, has vocational skills, and military experience, yet he has
8 chosen a path of drug trafficking. In addition, the government anticipates that defendant
9 will ask for a reduced sentence because he is purportedly the caregiver for his father
10 who – according to the PSR – is bedridden and relies on defendant for all activities,
11 including bathing, going to the restroom, etc. This is not mitigating because defendant
12 voluntarily engaged in drug trafficking even while knowing that he was the caretaker for
13 his father. That fact should not know be used to support a reduced sentence.

14 On balance, the government believes that a sentence of 87 months' imprisonment
15 followed by a three-year term of supervised release is a sufficient, but not greater than
16 necessary sentence.

17 **VI. CONCLUSION**

18 For the foregoing reasons, the government respectfully requests that this Court
19 grant the government's motion to strike the increased penalty provision pursuant to 21
20 U.S.C. § 841(b)(1)(A) in the Indictment and proceed with sentencing defendant under 21
21 U.S.C. § 841(b)(1)(C). The government also respectfully requests that this Court impose
22 the following sentence: 87 months' imprisonment followed by a three-year period of
23 supervised release, and a \$100 special assessment.